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No. 84-586

In the Supreme Court of the United States

OCTOBER TERM, 1984

PETER ANGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether "any person" in Section 3008(d) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6928(d), which makes disposal of hazardous waste without a permit a criminal offense, includes employees or is limited to owners and operators of plants that use hazardous wastes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 741 F.2d 662. The opinion of the district court (Pet. App. 36a-68a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1984. The petition for a writ of certiorari was filed on October 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Prior to amendment in 1984, Section 3008(d) of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6928(d), provided in pertinent part:

Criminal penalties.

Any person who —

* * * * *

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subtitle [42 U.S.C. 6921-6934] either —

(A) without having obtained a permit under section 3005 [42 U.S.C. 6925] (or 3006 [42 U.S.C. 6926] in the case of a State program) * * *; or

(B) in knowing violation of any material condition or requirement of such permit;

* * * * *

shall, upon conviction, be subject to a fine of not more than $25,000 ($50,000 in the case of a violation of paragraph (1) or (2)) for each day of violation, or to imprisonment not to exceed one year (two years in the case of a violation of paragraph (1) or (2)), or both. * * *

The statute was amended on November 9, 1984, by Section 232 of the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3257. As amended, Section 3008(d)(2)(A) now provides that any person who disposes of hazardous waste "without a permit under this subtitle" is subject to criminal penalties.

STATEMENT

Petitioner was charged with violating Section 3008(d)(2) of the Resource Conservation and Recovery Act, 42 U.S.C. 6928(d)(2), by causing hazardous wastes to be pumped from his employer's plant into a trench which fed into a creek and, ultimately, the Delaware River. Before trial, the district court struck these charges, noting that petitioner was "not responsible for the overall operation" of the plant (Pet.

App. 61a). The district court held that petitioner did not fit within the class of persons Section 3008(d)(2) was intended to penalize because he was not an owner or operator of the plant. The court of appeals reversed, concluding that petitioner was "any person" within the meaning of Section 3008(d)(2).

1. Petitioner is the service manager of the parts department at the Mount Laurel, New Jersey, plant of Johnson & Towers, Inc. (Pet. 11; Pet. App. 4a n.1). Bus and truck engines are repaired, rebuilt, and overhauled at the plant (Pet. 8; Pet. App. 3a, 38a), and degreasing agents "flow from the cleaning process utilized for purposes of cleaning and stripping engines" (Pet. 9). These liquids travel through a network of drains and pipes into a holding tank on plant property (Pet. 9; Pet. App. 3a). Plant personnel use large amounts of degreasers and other industrial chemicals containing methylene chloride, chlorobenzene, and ethyl benzene (Pet. App. 73a-74a), which have been listed as hazardous wastes by the Environmental Protection Agency (EPA) pursuant to Section 3001(b)(1) of RCRA, 42 U.S.C. 6921(b)(1).[1]

Petitioner was indicted on March 29, 1983, along with the foreman of the plant and their employer. The indictment alleged that petitioner "managed, supervised and directed a substantial portion" of plant operations, "including those related to the treatment, storage and disposal of hazardous wastes and pollutants" (Pet. App. 75a). It went on (Pet. App. 82a-87a) to accuse petitioner, the foreman, and their employer of having knowingly treated, stored, and disposed of hazardous wastes without obtaining the necessary permit, thereby violating Section 3008(d)(2) of RCRA, 42 U.S.C. 6928(d)(2). The indictment also charged Clean

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[1]See 40 C.F.R. 261.30, 261.31, and 40 C.F.R. Pt. 261 App. VII.

Water Act violations and contained a conspiracy count.[2] The offense was alleged to have occurred on three consecutive days when degreasers and other industrial chemical wastes were pumped from the plant's holding tank into a trench on plant property (Pet. App. 73a, 78a, 82a-86a). On the third day, the overflow from the trench spilled into a creek which feeds a tributary of the Delaware River (Pet. App. 39a, 88a). Petitioner and the two co-defendants were also charged with aiding and abetting the RCRA violations, in violation of 18 U.S.C. 2 (Pet. 5-6; Pet. App. 83a, 85a, 87a). The corporate employer pleaded guilty to the RCRA violations (Pet. 6; Pet. App. 6a, 65a). Petitioner and the foreman pleaded not guilty and moved to dismiss the indictment.

2. The district court granted the motion in part. It refused to strike the aiding-and-abetting charges or the counts of the indictment involving the Clean Water Act (Pet. App. 69a-70a). But it struck those portions of the indictment which charged that petitioner and the foreman had violated Section 3008(d)(2) of RCRA, 42 U.S. 6928(d)(2). The court concluded that the seemingly broad phrase "any person," as used in Section 3008(d)(2), did not include employees. In the district court's view, "any person" who disposes of hazardous wastes "without having obtained a permit under section 3005" can only be a person required to apply for a permit (Pet. App. 47a). Those whom Section 3005(a) of RCRA, 42 U.S.C. 6925(a), requires to seek a permit are "operators or owners" of facilities used "for the

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[2]The indictment (Pet. App. 88a-89a) charged petitioner and the co-defendants with discharging pollutants into waters of the United States in violation of Section 309(c)(1) of the Clean Water Act, 33 U.S.C. 1319(c)(1), and conspiring, in violation of 18 U.S.C. 371, to violate RCRA and the Clean Water Act (Pet. App. 77a-81a). No defendant has sought to dismiss the Clean Water Act count or the conspiracy count (Pet. App. 67a-68a).

treatment, storage, or disposal of hazardous waste." Petitioner and Hopkins were not owners of the plant. The district court found that they were not its "operators" either, because the relevant EPA regulation defines "operator" as "the person responsible for the overall operation of a facility," 40 C.F.R. 260.10. The district court noted that petitioner, although "the service manager and possibly in charge of one department, * * * was not responsible for the [plant's] overall operation" (Pet. App. 60a-61a). Neither was the foreman, who "was one step below [petitioner] * * * on the hierarchical ladder" (*ibid.*).

3. The court of appeals reversed and remanded, reinstating all of the RCRA charges. It concluded that "[i]t would undercut the purposes of the legislation to limit the class of potential defendants to owners and operators when others also bear responsibility for handling regulated materials" (Pet. App. 20a). The court of appeals interpreted the phrase "without having obtained a permit under section 3005" as merely identifying the RCRA permit section and as exempting permit holders from prosecution under Section 3008(d)(2)(A). This phrase, concluded the court, "has no other limiting effect" (*ibid.*). Accordingly, the court of appeals held that petitioner and his co-defendant each qualified as "any person" within Section 3008(d)(2).

The court of appeals also considered the meaning of "knowingly" in Section 3008(d)(2). It held that the statute required the prosecution to show that petitioner and the foreman knew that the substance they disposed of was a hazardous waste and that their employer was required to have, but did not have, a permit (Pet. App. 31a).[3] Such

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[3]The government had contended (Pet. App. 21a) that the only proof needed for conviction was proof of the objective facts that the accused is a "person," that he handled hazardous wastes, and that no permit for such disposal or treatment was in existence. The government denied

knowledge, the court of appeals found, "may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant" (Pet. App. 32a). The court observed that the case had reached it without "any evidence or findings of the defendants' actual knowledge of the facts at issue, and with inconsistent descriptions of defendants' responsibilities" (Pet. App. 31a-32a). The case was remanded for trial.

4. Congress amended Section 3008(d)(2)(A), in light of the district court's opinion, to make clear that "any person" included employees. Pub. L. No. 98-616, 98 Stat. 3257. It did this by deleting the phrase "having obtained" from the subsection so that the provision forbids "any person" from disposing of hazardous waste "without a permit." On July 25 — before the court of appeals had reversed the district court — Senator Lautenberg, who introduced the amendment on the Senate floor, declared that the district court's decision in this case had created a "dangerous loophole" in RCRA. By confining criminal liability only to "owners and operators technically responsible for acquiring a disposal permit," the district court indulged in a "misreading of [previous] congressional intent," 130 Cong. Rec. S9161 (daily ed. July 25, 1984). Senator Lautenberg stated: "It was not the intent of Congress that criminal liability extend only to owners and operators of facilities who are responsible for obtaining a RCRA permit. * * * The amendment I offer * * * would clarify congressional intent to extend the criminal penalty provisions of RCRA to any person who knowingly engages in illegal dumping practices" (*ibid.*).

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that defendants' knowledge that the waste was hazardous or that a permit was lacking need be proved. The government does not concur in the view that the prosecution must show actual knowledge of such matters, but has not sought further review of this aspect of the court of appeals' decision.

ARGUMENT

This case is not ripe for review since defendant has not been acquitted or convicted. Moreover, the decision of the court of appeals is, as petitioner states (Pet. 13), one of first impression. It correctly includes petitioner within the class of offenders, does not conflict with any decision of this Court or of any other court of appeals, and presents no issue warranting further review. Furthermore, since Section 3008 was amended in 1984, the issue presented by this case has been resolved for the future.

1. As an initial matter, whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in the position he would have occupied had the district court denied the motion to strike. If petitioner is acquitted following a trial on the merits, his contentions concerning the meaning of Section 3008(d)(2) will be moot. On the other hand, if petitioner is convicted and his conviction is affirmed on appeal, petitioner will then be able to present his contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari, seeking review of those final judgments. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.

2. Section 3008(d)(2) of RCRA, 42 U.S.C. 6928(d)(2), makes it unlawful for "any person" to dispose of hazardous waste without a permit. Petitioner would have himself read out of this class by equating "any person" with the much smaller class named in Section 3005(a) of RCRA, 42 U.S.C. 6925(a), "each person owning or operating" a hazardous waste facility. This smaller class describes those who must apply for the relevant EPA permit. Petitioner accuses the court of appeals of legislating into Section 3008(d)(2) the word employee (Pet. 15) — apparently suggesting that it would be odd to view an employee as a "person." But

"person" is defined in Section 1004(15) of RCRA, 42 U.S.C. 6903(15), to include "an individual," together with many other entities, and this definition governs usage of the term throughout RCRA.[4]

Nothing in the legislative history of RCRA shows "clear evidence of a * * * legislative intention" to depart from the plain meaning of the phrase "any person" or to restrict it in the manner proposed by petitioner and the district court (*United States* v. *Apfelbaum,* 445 U.S. 115, 121-122 (1980)).[5] When RCRA was enacted in 1976, the House committee report did not suggest that employees were exempt persons under the Act. To the contrary, it characterized the penalties of Section 3008(d) as providing "a broad variety of mechanisms so as to stop the illegal disposal of hazardous wastes" (H.R. Rep. 94-1491, 94th Cong., 2d Sess. 31 (1976)).[6]

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[4]Besides "individual," a "person" under Section 1004(15) means a "trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body."

[5]The relevant legislative discussions of Section 3008, prior to the 1984 amendment, are found at H.R. Rep. 94-1491, 94th Cong., 2d Sess. 59 (1976); 124 Cong. Rec. 21596-21597, 34902-34905 (1978); H.R. Conf. Rep. 96-1444, 96th Cong., 2d Sess. 36-37, 40 (1980).

[6]The history of the 1980 Amendments to Section 3008 tends to refute the district court's idea that employees were excluded from the class of offenders. Section 13(5) of the 1980 Amendments (Pub. L. No. 96-482, 94 Stat. 2340) added Subsection (e) to Section 3008 (42 U.S.C. 6928(e)), which provided "enhanced felony penalties for certain life threatening conduct," H.R. Conf. Rep. 96-1444, *supra,* at 37-39. Amended Section 3008(e)(1) incorporates a violation of Section 3008(d)(2) as an element of its own prescribed offense. Significantly, the House committee commented that a "supervisor * * * who personally lacks the necessary knowledge" required in Subsection (e), should "not be criminally prosecuted for knowledge that only his subordinates possessed," H.R. Conf. Rep. 96-1444, *supra,* at 40. The negative inference is clear, namely, that, if the required *scienter* under Subsection (e) is established, then any

In short, the court of appeals correctly resolved the issue presented by petitioner by giving the phrase "any person" in Section 3008 its plain meaning.

3. Congress has amended Section 3008, and the legislative history of the 1984 Amendment clearly shows that any prior doubt whether Congress intended to include employees in the phrase "any person" has now been resolved. Since the issue is unlikely to arise in the future, this may be a case of first and last impression.

Moreover, denying the petition is not unfair to petitioner. The court of appeals stated that to convict under Section 3008(d)(2) a jury must find that petitioner knew or should have known that the waste being handled was hazardous (Pet. App. 23a), that his employer was required to have a permit, and that his employer had none (Pet. App. 31a). Thus, petitioner, after remand to the district court, will be in the unremarkable position in which most criminal defendants find themselves. "[T]he cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient" (*United States* v. *Bailey*, 444 U.S. 394, 408 (1980)). No standard approaching strict liability, which the district court was prepared to apply to "owners or operators" of hazardous waste facilities (Pet. App. 49a), is presently part of the mandate from the court of appeals governing the way petitioner's innocence or guilt will be resolved.

In short, the issue presented does not warrant review by this Court because it will not arise again and no unfairness will result from denying the petition.

"subordinate" may be prosecuted under Subsection (e). And since Subsection (e) encompasses Subsection (d)(2) as a lesser included offense, it makes no sense to ascribe to Congress an intent to immunize low-level employees from Subsection (d)(2) prosecutions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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